

# DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-4882-N-01]

## America's Affordable Communities Initiative, HUD's Initiative on Removal of Regulatory Barriers: Proposals for Incentive Criteria on Barrier Removal in HUD's Funding Allocations

**AGENCY:** Office of the General Counsel, HUD.

**ACTION:** Notice.

**SUMMARY:** In June 2003, HUD announced America's Affordable Communities Initiative, a new Departmentwide initiative that will focus on breaking down regulatory barriers that impede the production of affordable housing. As part of this effort, HUD will, among other things, analyze federal, state, and local regulations and procedures that are duplicative, contradictory, or burdensome, and work within the federal government and with HUD's state and local partners to break down these barriers. HUD will undertake activities designed to promote barrier removal by state and local governments and, where feasible, provide incentives to state and local governments to remove regulatory barriers to affordable housing.

The purpose of this notice is to solicit comment from prospective applicants on proposals to provide incentives to barrier removal in HUD's funding allocations and on an initial proposal for providing incentive to barrier removal in HUD's Fiscal Year (FY) 2004 competitive funding process.

As an initial incentive action, HUD proposes to establish in the majority of its FY2004 Notices of Funding Availability (NOFAs), including HUD's SuperNOFA, a policy priority for increasing the supply of affordable housing through the removal of regulatory barriers. This new policy priority will be added to the list of policy priorities that HUD traditionally includes in its NOFAs. As a policy priority (and like the other policy priorities), higher rating points will be available to governmental applicants that are able to demonstrate successful efforts in removing regulatory barriers to affordable housing, and to nongovernmental applicants that are associated with jurisdictions that have undertaken successful efforts in removing barriers.

This notice describes how HUD proposes to award these policy points in its NOFAs. HUD welcomes comments on this proposal, including the process described to obtain these points. While this notice describes one initial proposal

for providing incentives to HUD grantees to undertake and support the removal of barriers to affordable housing, HUD is considering other proposals and welcomes comments from the public on other ideas for ways HUD can provide incentives in its funding processes or other mechanisms to encourage localities to remove barriers and increase the supply of affordable housing.

**DATES:** *Comment Due Date:* December 29, 2003.

**ADDRESSES:** Interested persons are invited to submit comments regarding this rule to the Regulations Division, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410-0500. Comments should refer to the above docket number and title. A copy of each communication submitted will be available for public inspection and copying during regular business hours (weekdays 8 a.m. to 5 p.m. Eastern time) at the above address. Facsimile (FAX) comments are not acceptable.

**FOR FURTHER INFORMATION CONTACT:** Camille E. Acevedo, Associate General Counsel for Legislation and Regulations, Office of General Counsel, Room 10282, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410-0500, telephone (202) 708-1793 (this is not a toll-free number). Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at (800) 877-8339.

### SUPPLEMENTARY INFORMATION:

#### I. Background: Policies Restricting Affordable Housing

Increasing opportunities for affordable rental and homeownership housing is one of the highest priorities of the Department. Over the last 15 years, there has been increased recognition that unnecessary, duplicative, excessive or discriminatory public processes often significantly increase the cost of housing development and rehabilitation. Often referred to as "regulatory barriers to affordable housing," many public statutes, ordinances, regulatory requirements, or processes and procedures significantly impede the development or availability of affordable housing without providing a commensurate or demonstrable health or safety benefit. "Affordable housing" is decent quality housing that low-, moderate-, and middle-income families can afford to buy or rent without spending more than thirty percent of their income. Spending more than thirty

percent of income on shelter may require families to sacrifice other necessities of life.

Addressing these barriers to housing affordability is a necessary component of any overall national housing policy. However, addressing such barriers must be viewed as a complement, not a substitute for other efforts to meet affordable housing needs. For many families, federal, state and local subsidies are fundamental tools for meeting these affordable housing needs. In many instances, however, other sometimes well-intentioned public policies work at cross-purposes with subsidy programs by imposing significant constraints. From exclusionary zoning that keeps out affordable housing, especially multifamily housing, to other regulations and requirements that unnecessarily raise the costs of construction, the need to address this issue is clear. For example, affordable rehabilitation is often constrained by outmoded building codes that require excessive renovation. Barrier removal will not only make it easier to find and get approval for affordable housing sites but it will also allow available subsidies to go further in meeting these needs. For housing for moderate-income families often referred to as "work force" housing, barrier removal can be the most essential component of meeting housing needs.

The Advisory Commission on Regulatory Barriers to Affordable Housing in its 1991 report "Not in My Backyard: Removing Barriers to Affordable Housing", <http://www.huduser.org/bibliodb/Bibliography.asp?id=5806>, estimated that these policies and procedures directly increase construction or rehabilitation costs by up to 35 percent. Over the past twelve years, numerous academic studies have confirmed this finding. In addition to direct cost impacts, many policies and processes further exacerbate the problem by constraining overall housing supply with a general deleterious impact upon overall housing affordability. A 35 percent reduction in development costs would allow millions of American families to buy or rent housing that they currently cannot afford.

In 1990, in the Cranston-Gonzales National Affordable Housing Act, Congress, for the first time, recognized the importance of public policies and processes to the supply of affordable housing. Section 105(b)(4) requires state and local governments to explain as part of their Comprehensive Housing Affordability Strategy (CHAS)—now included in HUD's Consolidated Plan—

whether a proposed public policy affects housing affordability and describe the jurisdiction's strategy to remove or ameliorate negative effects, if any, of such policies (*see* 24 CFR 91.210(e) and 24 CFR 91.310(d)). Congress, in Title XII of the 1992 Housing and Community Development Act, reiterated its interest in this important subject by authorizing grants for regulatory barrier removal and established a Regulatory Barriers Clearinghouse (*see* <http://www.regbarriers.org>). In the American Homeownership Act of 2000, Congress reauthorized the Clearinghouse and simplified procedures for a barrier removal grant program.

## II. HUD's Incentive Proposal

Because of the now widely recognized impact that excessive or exclusionary policies and processes have had upon the costs of low-, moderate-, and middle-income housing programs and upon overall housing supply and costs, the importance of reducing costs in HUD-assisted housing, the 13-year Congressional recognition of this issue, and the Department's overall commitment to increasing the supply of new and rehabilitated affordable housing, HUD proposes to undertake actions and efforts that provide incentives to governments and their constituents to work to remove regulatory barriers to affordable housing. This notice advises of one proposal and seeks ideas for other mechanisms to encourage this priority. HUD is considering including in the list of policy priorities for its NOFAs, commencing in FY2004, a policy priority for the removal of regulatory barriers.

The inclusion of regulatory barrier removal as a policy priority in HUD NOFAs would be designed to provide support and encouragement to applicants, including applicants that are non-governmental, to (1) directly undertake activities that will remove barriers to affordable housing within their communities or support such undertaking by units of government and others, (2) streamline local governmental processes and procedures or support such undertaking, and (3) eliminate redundant or excessive requirements, or statutes, regulations, and codes which impede the development or availability of affordable housing, or support such undertaking.

This policy priority also relates to HUD's Strategic Goals for (1) "Increasing Homeownership Opportunities" by making the home buying process less complicated and

less expensive, and (2) "Promoting Decent Affordable Housing" by expanding access to affordable housing by making it more readily available in the community. The inclusion of this policy priority in HUD NOFAs would be in addition to policy priorities, which are currently included in HUD's NOFAs and which reflect the mission and strategic goals of the Department. Advance notice of the proposed addition of this policy priority is appropriate because HUD wants to initiate, in advance of its FY2004 funding round, discussion among state and local governments and their constituents (particularly those that are applicants for HUD funding) regarding local efforts that have been taken to remove regulatory barriers to affordable housing. Press coverage of affordable housing has confirmed the importance of this issue throughout the nation. Increasing the supply of affordable housing will be successful when all parties at the local level (governments, residents, housing providers, and nonprofit organizations) are involved and working together to support efforts to break down regulatory barriers to affordable housing. Partnerships are frequently formed between governments and nonprofit organizations for HUD funding, and this particular policy priority in NOFAs is directed to further promoting those partnerships, and promoting the communitywide efforts to remove barriers to affordable housing.

## III. Programs Covered by the NOFA Incentive Proposal

The programs that HUD proposes to be subject to the questions, evaluation and rating system described in Section IV of this notice, may include, but not necessarily be limited to the HUD programs and initiatives listed in this Section III, which are those for which Congress generally appropriates funding on an annual basis and for which HUD generally issues a NOFA to make funding available. Programs may be added depending upon appropriations for FY2004 or administrative decision on the part of the Department, and programs may be removed from the list depending upon the Department's determination of the appropriateness of applying this policy priority to a particular program.

- Lead Hazard Control Program
- Healthy Homes Demonstration
- Youthbuild
- Rural Housing and Economic Development
- Continuum of Care
  - Supportive Housing Program (SHP)
  - Shelter Plus Care (S+C)
  - Section 8 Moderate Rehabilitation

SRO Program for Homeless Individuals

- Shelter Plus Care Renewals
- Housing Opportunities for Persons With AIDS (HOPWA)
- Section 202 Supportive Housing for the Elderly
- Section 811 Supportive Housing for Persons With Disabilities
- Assisted Living Conversion Program
- Resident Opportunities and Self-Sufficiency (ROSS) Program
- ROSS for Resident Service Delivery Models—Elderly
- ROSS for Resident Service Delivery Models—Family
- ROSS for Neighborhood Networks
- ROSS for Homeownership Supportive Services
- Service Coordinators in Multifamily Housing
- Community Outreach Partnership Centers
- Housing Counseling
- Lead Hazard Reduction Demonstration
- HUD Urban Scholars Fellowship Program
- Early Doctoral Student Research Grant Program
- Doctoral Dissertation Research Grant Program
- HOPE VI
- Brownfields Economic Development Initiative (BEDI)

For HUD's Self-Help Housing Opportunities Program (SHOP) and programs that may be similar to SHOP in which large national or regional organizations distribute HUD funds on a competitive basis among organizations to facilitate the funded-programs' eligible activities, the larger organizations will implement the policy priority through their funding availability documents. That is, the organizations competing for the HUD funds made available by the larger organizations will have the opportunity, through their application for funds, to claim the points made available for this policy priority.

The list of proposed programs that would be covered by this option reflects the Department's objective to apply this policy priority to as many HUD-funded programs as possible. As will be more fully discussed in the sections of this notice that follow the application of the policy priority is not directed only to state, local, and tribal governments involved in efforts to remove barriers to affordable housing, but also to those organizations and individuals that reside in areas for which state, local, or tribal governments have undertaken such efforts. Successful efforts to remove regulatory barriers to affordable

housing are those in which residents and organizations are working with and supporting the efforts and actions of their local governments to remove barriers to affordable housing. Although the Department has worked to make this policy priority applicable to as many applicants for HUD funding as possible, there is recognition that this policy priority may not be one for which all applicants will be eligible for the higher points made available, but that is the case for all of the policy priorities listed in HUD NOFAs. HUD has strived not only to make the information to be provided by applicants to obtain the incentive points easily obtainable, but also to promote dialogue between housing advocates and their governments on removal of regulatory barriers.

#### IV. Evaluation Criteria

Although the policies and processes that affect housing affordability are many and diverse, the following evaluative questions have been determined to be significantly important and have broad-based applicability to measure state, local, and tribal government efforts at regulatory reform so as to be considered good "markers" for effective regulatory reform.

All applicants submitting applications in response to FY2004 NOFAs will be invited to address the questions below to be eligible to receive points allocated

for the policy priority of regulatory barrier removal.

Local jurisdictions applying for funding, as well as housing authorities, nonprofit organizations, and other qualified applicants applying for funding for a project located in an incorporated jurisdiction, are invited to answer the 12 questions in Part A and may be asked to provide supporting statements, references, and documentation. The references or documentation to support the affirmative statements may be provided as hard copy, or Web site URLs where the information may be found. An applicant that scores at least 3 in Column 2 will receive one point in the NOFA evaluation. An applicant that scores 6 or greater in Column 2 will receive two points in the evaluation.

State agencies or departments applying for funding, as well as housing authorities, nonprofit organizations and other qualified applicants applying for funds for projects located in unincorporated areas will be invited to answer the 6 questions in Part B and may be asked to provide supporting statements, references, and documentation. The references or documentation to support the affirmative statements may be provided as hard copy, or Web site URLs where the information may be found. An applicant that scores at least 2 in Column 2 will receive one point in the

NOFA evaluation. An applicant that scores 3 or greater will receive two points in the respective evaluation.

Applicants that will be providing services in multiple jurisdictions can choose to address the questions in either Part A or Part B for that jurisdiction in which the preponderance of services will be performed if an award is made. In no case can an applicant receive for this policy priority greater than two points for barrier removal activities. For applicants that are tribes or Tribally Designated Housing Entities (TDHEs), the tribes or TDHEs can choose to complete either Part A or Part B based upon a determination by the tribes or TDHE as to whether the tribe's or the TDHE's association with the local jurisdiction or the state would be the more advantageous for its application.

HUD invites careful review of these questions and welcomes comments on whether these questions address the significant governmental regulatory areas relative to affordable housing, and are sufficiently broad-based to measure governmental efforts at regulatory reform. The questions are also designed to motivate nongovernmental applicants to take notice of the regulatory reform efforts of their governments (or lack of such efforts) promote regulatory barrier reform where there are no such efforts, and support and encourage continued efforts where efforts at barrier removal have been undertaken.

#### A. LOCAL JURISDICTIONS AND OTHER APPLICANTS APPLYING FOR PROJECTS LOCATED IN INCORPORATED JURISDICTIONS ("JURISDICTION")

	1.	2.
1(a). Does your Jurisdiction's comprehensive plan (or in the case of a tribe or TDHE, a local Indian Housing Plan) include a "housing element" which estimates current and anticipated housing needs for all existing and future residents for at least the next ten years, including various types of housing such as multifamily housing and housing for low-, moderate-, and middle-income residents, and does the housing element provide for policies and procedures to address that need? .....	No _____	Yes _____
1(b). Does your zoning ordinance and map or other land use regulations conform to the Jurisdiction's comprehensive plan and provide sufficient land use and density categories to address existing and future housing needs, including low-, moderate-, and middle-income housing, and is sufficient land zoned or mapped "as of right" in these categories to meet all existing and future housing needs? (For purposes of this notice, "as-of-right," as applied to zoning, means uses and development standards that are determined in advance and specifically authorized by the zoning ordinance. The ordinance is largely self-enforcing because little or no discretion occurs in its administration.) .....	No _____ Yes _____	Yes _____ No _____
2. Does your Jurisdiction impose development impact fees? .....	No _____	Yes _____
3. If yes to 2 above, does your Jurisdiction provide waivers of these fees for affordable housing for low-, moderate-, and middle-income housing? .....	No _____	Yes _____
4. Has your Jurisdiction adopted specific building code language regarding housing rehabilitation that encourages the continued use or reuse of legally existing buildings through various degrees of housing rehabilitation? Such a code establishes graduated regulatory requirements applicable as different levels of work are performed in existing buildings. Such a code increases regulatory requirements in proportion to the extent of rehabilitation that an owner/developer chooses to do on a voluntary basis and the additional improvements required as a matter of regulatory policy. For further information see HUD publication: "Smart Codes in Your Community: A Guide to Building Rehabilitation Codes" ( <a href="http://www.huduser.org/publications/destech/smartcodes.html">http://www.huduser.org/publications/destech/smartcodes.html</a> ) .....	No _____	Yes _____

**A. LOCAL JURISDICTIONS AND OTHER APPLICANTS APPLYING FOR PROJECTS LOCATED IN INCORPORATED JURISDICTIONS  
("JURISDICTION")—Continued**

	1.	2.
5. Does your Jurisdiction use a recent version ( <i>i.e.</i> published within the last 5 years) of one of the nationally recognized model building codes ( <i>i.e.</i> the International Code Council (ICC), the Building Officials Code Administrators (BOCA), the Southern Building Code International (SBCI), the International Conference of Building Officials (ICBO), the National Fire Protection Association (NFPA)) without significant amendment or modification, or alternatively in the case of a tribe or TDHE, has adopted a building code that is substantially equivalent to one or more of the recognized model building codes? .....	No ____	Yes ____
6. Does your Jurisdiction's zoning ordinance or land use regulations permit manufactured and modular housing "as of right" in all residential districts and zoning classifications in which similar site-built housing is permitted subject to design, density, building size and other similar requirements applicable to all housing in that district irrespective of the method of production? .....	No ____	Yes ____
7. Within the past five years, has the Jurisdiction official ( <i>i.e.</i> , chief executive, mayor, county chairman, city manager, administrator, or a tribally recognized official, <i>etc.</i> ), the local legislative body, or planning commission, directly or in partnership with major private or public stakeholders, convened or funded comprehensive studies, commissions, or panels to review, or the Jurisdiction has established an ongoing process to review the rules, regulations, development standards, and processes of the jurisdiction to assess their impact on the supply of affordable housing and have major regulatory or other reforms been implemented as a result of that study? .....	No ____	Yes ____
8. Within the past five years has your Jurisdiction modified infrastructure requirements ( <i>e.g.</i> water, sewer, sidewalks street width) to significantly reduce the cost of new housing development or rehabilitation? .....	No ____	Yes ____
9. Does your Jurisdiction give "as-of-right" density bonuses as an incentive for any market rate residential development that includes a portion of housing for low-, moderate-, or middle-income housing? (As applied to density bonuses, "as of right" means a density bonus granted for a fixed percentage or number of additional market rate dwelling units in exchange for the provision of a fixed number of affordable dwelling units and without the use of discretion in determining the number of additional market rate units.) .....	No ____	Yes ____
10. Has your Jurisdiction established a single, consolidated permit application process for housing development that includes building, zoning, engineering, environmental, and related permits? .....	No ____	Yes ____
11. Does your Jurisdiction, as a matter of public policy, provide for expedited or "fast track" permitting and approvals for all affordable housing projects in your community? .....	No ____	Yes ____
12. Has your Jurisdiction established time limits for government review and approval or disapproval of development permits in which failure to act by the government within the designated time period deems the project approved? .....	No ____	Yes ____
13. Does your Jurisdiction explicitly allow "accessory apartments" either as: (1) a special exception or conditional use in all single-family residential zones or, (2) "as of right" in a significant number of residential districts otherwise zoned for single-family housing? .....	No ____	Yes ____
Total Points .....	____	____

**B. STATE AGENCIES AND DEPARTMENTS OR OTHER APPLICANTS APPLYING FOR PROJECTS LOCATED IN UNINCORPORATED  
AREAS**

	1.	2.
1. Does your State, either in its planning and zoning enabling legislation or in any other legislation, require a "housing element" in all local jurisdictions' comprehensive plans or zoning ordinances which estimates current and anticipated housing needs for all existing and future residents for at least the next ten years, including low-, moderate- and middle-income residents, and does the housing element require local policies and procedures to address that need? .....	No ____	Yes ____
2. Does your state have an agency or office that includes a specific mission to determine whether local governments have policies or procedures that are raising costs or otherwise discouraging affordable housing? ..	No ____	Yes ____
3. Does your state have a legal or administrative requirement that local governments undertake periodic regulatory and barrier removal self-evaluation to encourage the construction or rehabilitation of affordable housing? .....	No ____	Yes ____
4. Does your state have a technical assistance or education program for local jurisdictions on identifying regulatory barriers and recommending strategies to local governments for their removal? .....	No ____	Yes ____
5. Does your state provide significant grant programs to local governments for housing, community development and/or transportation funding linked or prioritized on the basis of regulatory barrier removal? If yes, what are they? .....	No ____	Yes ____
6. Within the past five years has your state made any changes to its own processes or requirements to significantly reduce the cost of new housing development or rehabilitation including: (a) streamlining or consolidating the state's own approval processes involving permits for water or wastewater, environmental review, or other State-administered permits or programs involving housing development; or (b) any other requirement for local jurisdictions regarding permitting, land use, building or subdivision regulations, or related administrative procedures involving housing development? If yes, describe. ....	No ____	Yes ____
Total Points .....	No ____	Yes ____

To assist NOFA applicants in reviewing their state and local regulatory environments so they can effectively address the questions above that are proposed to be incorporated in all FY2004 NOFAs, the Department recommends visiting HUD's Regulatory Barriers Clearinghouse (RBC) at <http://www.huduser.org/rbc/>. This Web site was created to support state, local, and tribal governments and other organizations seeking information about laws, regulations, and policies affecting the development, maintenance, improvement, availability and cost of affordable housing. To encourage better understanding of the impact of regulatory issues on housing affordability the Web site includes an extensive bibliography of major studies and guidance materials to assist state, local and tribal governments in fashioning solutions and approaches to expanding housing affordability through regulatory reform at [http://www.huduser.org/rbc/relevant\\_publications.html](http://www.huduser.org/rbc/relevant_publications.html).

#### **V. Solicitation of Public Comment**

Again, HUD welcomes comments from prospective applicants that may be

eligible for the higher rating points offered under this initial proposal, from other applicants, and from other interested members of the public. HUD seeks comments on the process for obtaining the points as proposed in this notice, and alternative ideas or suggestions on how this priority matter may be addressed through HUD's NOFA or other processes, such as HUD's Consolidated Plan. HUD also invites comments as to whether the regulatory barrier questions being posed to applicants would be accurate indicators of regulatory reform. HUD also invites comments as to whether there are other changes in local government developmental approval processes, land use or building regulations, subdivision regulations, or administrative procedures that can significantly reduce the cost of new housing development or rehabilitation that have not been included. During the public comment period, HUD may meet with representatives of state, local, and tribal governmental officials, as well as nonprofit organizations, to discuss this proposal and solicit more directly views, suggestions, and alternatives on

how incentive criteria can work effectively with respect to HUD's award and allocation of funds or other processes.

HUD will publish a second notice advising of the responses to the solicitation of public comment, and announcing if HUD intends to proceed with this proposal for the FY 2004 competitive funding process. If HUD decides to proceed with this proposal, the second notice will also advise of any significant changes that HUD intends to make in the implementation of the proposal. HUD also anticipates publishing additional notices on this or other methods of utilization of incentive criteria for removal of regulatory barriers in HUD funding allocations, and in this regard HUD welcomes ideas from the public on other proposals that should be considered.

Dated: October 28, 2003.

**A. Bryant Applegate,**

*Senior Counsel and Director of America's Affordable Communities Initiative.*

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